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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO SAMAYOA SALGUERO, Defendant and Appellant.	B286757 (Los Angeles County Super. Ct. No. VA007031)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed as modified and remanded with directions.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 1990, appellant Eduardo Salguero arranged, under false pretenses and following threats and abuse, to meet his estranged wife, Maria Nunez Pineda, at the home where she lived with her employer, Kianfar Barkhordar. Appellant insisted Pineda exit the home to approach his car, and held a knife to her throat when she refused. Pineda fled into Barkhordar's bedroom, pursued by appellant, who killed Barkhordar by stabbing him nine times; appellant viciously stabbed Pineda as well. Decades later, following appellant's extradition, the state charged him with Barkhordar's murder and Pineda's attempted murder. The state alleged the special circumstance that the murder occurred during an attempt to kidnap Pineda (the felony-murder special-circumstance allegation). At trial, the prosecution argued the killing was first degree murder, relying on both a felony-murder theory and a premeditation and deliberation theory. Appellant's sole defense was that he was not the perpetrator.

A jury convicted appellant of first degree murder and attempted murder, and found true the felony-murder special-circumstance allegation. The trial court sentenced appellant to life in prison without the possibility of parole on the murder count and a consecutive life term on the attempted murder count. The court found appellant ineligible for any "good time/work time credit" (presentence conduct credit) and imposed a parole revocation fine.

On appeal, appellant contends: (1) insufficient evidence supported his first degree murder conviction; (2) the trial court prejudicially erred by failing to instruct on the elements of the felony-murder special-circumstance allegation; (3) the trial court erred in failing to award him 888 days of presentence conduct credit; (4) the trial court erred in imposing the parole revocation fine; and (5) the abstract of judgment must be corrected to conform his sentence on the attempted murder count to the trial court's oral pronouncement of sentence. Respondent disputes the first two contentions but agrees with appellant on the latter three.

We affirm the judgment as modified to award appellant 888 days of presentence conduct credit and to strike the parole revocation fine, and remand to the trial court with instructions to correct the abstract of judgment to reflect a life term, rather than a life term without the possibility of parole, on count two.

STATEMENT OF THE CASE

The state charged appellant, pursuant to Penal Code section 187, with Barkhordar's murder. In connection with the murder count, the state alleged two special circumstances: (1) appellant committed the murder while engaged in the attempted commission of kidnapping, within the meaning of Penal Code section 190.2, subdivision (a)(17); and (2) appellant personally used a deadly and dangerous weapon in the commission of the murder. The state further

charged appellant, pursuant to Penal Code sections 187 and 664, with the attempted willful, deliberate, and premeditated murder of Pineda. In connection with the attempted murder count, the state alleged appellant's use of a deadly and dangerous weapon and, pursuant to Penal Code section 12022.7, subdivision (a), appellant's infliction of great bodily injury on Pineda.

A jury convicted appellant of first degree murder and attempted willful, deliberate, and premeditated murder. The jury found all special-circumstance allegations true.

The trial court sentenced appellant to life in prison without the possibility of parole on the murder count (in addition to a determinate term of five years). It sentenced him to a consecutive life term on the attempted murder count, which was recorded in the abstract of judgment as a life term without the possibility of parole. The court did not award appellant any presentence conduct credit, finding him ineligible. The court ordered appellant to pay a $300 parole revocation fine.

Appellant timely appealed.

PROCEEDINGS BELOW

A. *Prosecution Case*

1. *Pineda's Testimony*

Pineda testified that she and appellant had lived together in El Salvador, as husband and wife, for seven years. They had a son. In the last two years of their relationship, appellant verbally, physically, and sexually

abused her. She discussed the abuse with her mother and moved to the United States on her mother's recommendation. In the United States, she began living with Barkhordar and his wife, Lizeth, working for them in their in-home day care center.

Appellant arrived in the United States one year after Pineda. Appellant made "constant" calls to Pineda. Appellant threatened "[t]hat if [Pineda] didn't go back with him, now that he was here, that he was going to kill [Pineda's] mom." Appellant convinced Pineda to meet him at the Barkhordars' home, ostensibly to drop off money he owed her mother.

Appellant arrived at the Barkhordars' home on the morning of December 8, 1990. When Pineda opened the door slightly, appellant twice told her to come outside to see his car. Pineda refused to go outside because she feared, due to appellant's prior threats, that he would kidnap her. Appellant drew a knife and held it to her throat. He then turned to look toward the street.

Pineda fled into Barkhordar's bedroom, waking him. Appellant followed Pineda in the bedroom, where he stabbed Barkhordar multiple times. Appellant then pursued Pineda into a closet, stabbing her about 20 times.

Pineda observed Barkhordar's wife, Lizeth, entering the room and appellant threatening to kill Lizeth if she called the police.

2. *Other Prosecution Evidence*

Lizeth testified that she heard a loud scream while showering and rushed into the bedroom she shared with her husband, Barkhordar. She saw her husband dying on the floor and a man -- whom she had never seen before, but whom she identified in court as appellant -- stabbing Pineda. Appellant silently confronted Lizeth, holding her shoulder with one hand and the knife with the other. He released her after she begged for her life and told him she was on his side. She called 911 from her son's room.

The parties stipulated that an autopsy report determined Barkhordar's death to be a homicide caused by multiple stab wounds.[1]

The prosecution called several Los Angeles County Sheriff's Department employees to testify concerning the collection and testing of DNA, including criminalist Jamie Daughetee. Daughetee testified that appellant's DNA was on a sweatshirt found at the crime scene, and that appellant was very likely the father of Pineda's son.

B. *Defense Case*

Appellant neither testified nor called any witnesses. He moved into evidence two exhibits used during cross-examination of prosecution witnesses to challenge the identification of appellant as the perpetrator.

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[1] The autopsy report was admitted into evidence. The parties agree it determined Barkhordar suffered nine stab wounds.

C. *Jury Instructions*

The court instructed the jury, per CALCRIM No. 520, that it could not convict appellant of first degree murder unless the prosecution proved, beyond a reasonable doubt, at least one of its two theories of first degree murder, viz., felony murder (premised on an attempt to kidnap Pineda) or premeditated, deliberate murder. The court delivered instructions on the elements of the felony-murder theory, kidnapping, and attempted kidnapping (CALCRIM Nos. 540A, 1215, and 460, respectively). In the process, the court instructed the jury that appellant's intent to commit kidnapping was an element of both the felony-murder theory and the attempted kidnapping.

The court instructed the jury, per CALCRIM No. 251, that each charged crime and allegation required proof that appellant committed a prohibited act with a specific intent, to be explained in the instructions for each crime or allegation. Similarly, the court instructed the jury, per CALCRIM No. 705, that the felony-murder special-circumstance allegation required proof of both the charged act and a particular intent or mental state, to be explained in the instruction for the allegation. However, the court did not deliver CALCRIM No. 730 or any other instruction on the elements of the felony-murder special-circumstance allegation. Neither party requested such an instruction.

The court instructed the jury, per CALCRIM No. 200, to follow the court's instructions rather than the attorneys' remarks if the two conflicted.

D. *Closing Arguments*

1. *Prosecutor's Closing Argument*

The prosecutor first argued the evidence proved first degree murder under the premeditation and deliberation theory. She argued appellant premeditated the murder by deciding to kill Barkhordar to remove him as an obstacle to reaching Pineda. She argued he deliberated during the time it took to inflict nine stab wounds, relying on the autopsy report's description of the wounds.

The prosecutor argued the evidence proved first degree murder under the felony-murder theory as well. She reminded the jury several times that the theory required a finding that appellant intended to "take" or kidnap Pineda. She relied on Pineda's testimony that appellant threatened to kill her mother if she did not go back with him, suggesting (although Pineda had not so testified) that this meant returning to El Salvador. She further relied on Pineda's testimony about appellant insisting she exit the house, holding a knife to her throat when she refused, and looking toward the street. She argued appellant followed Pineda into the house either "to drag her out" or to kill her. She argued appellant intended take Pineda "back to El Salvador where she belonged, where she needed to be for him to control her."

The prosecutor told the jury her discussion of the felony-murder special-circumstance allegation would be repetitive of things the jury had already heard. Implicitly comparing the allegation to the felony-murder theory of first

degree murder, she informed the jury that it would be provided "[t]he same jury instructions" with "the same basic content." She asked the jury "to find that special circumstance true because [appellant] was there to kidnap [Pineda]."

2. *Defense Closing Argument*

Appellant's counsel did not challenge the prosecutor's arguments concerning first degree murder or the felony-murder special-circumstance allegation. Instead, he observed the prosecutor "made a very good presentation, which [was] accurate and well-stated." He argued the prosecutor's arguments were irrelevant, however, because appellant was not the perpetrator. He argued the prosecution had failed to prove appellant's identity as Barkhordar's killer (and Pineda's assailant) beyond a reasonable doubt.[2]

DISCUSSION

Appellant contends: (1) insufficient evidence supported his first degree murder conviction; (2) the trial court prejudicially erred by failing to instruct the jury on the elements of the felony-murder special-circumstance allegation; (3) the trial court erred in failing to award him 888 days of presentence conduct credit; (4) the trial court

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[2] The prosecutor responded to appellant's counsel's challenges to the identification evidence in rebuttal. Additionally, she asserted that appellant's one goal in meeting Pineda was to take Pineda home to El Salvador.

erred in imposing the parole revocation fine; and (5) the abstract of judgment must be corrected to conform his sentence on the attempted murder count to the trial court's oral pronouncement of sentence.

A. *Sufficiency of the Evidence Supporting Appellant's First Degree Murder Conviction*

Appellant argues insufficient evidence supported each of the two theories of first degree murder on which the prosecution relied, viz., felony murder and premeditated, deliberate murder.

1. *Standard of Review*

We review the sufficiency of the evidence supporting a conviction for substantial evidence, meaning evidence from which a reasonable fact finder could find the defendant guilty beyond a reasonable doubt. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1126.) "'Where the jury considers both a factually sufficient and a factually insufficient ground for conviction, and it cannot be determined on which ground the jury relied, we affirm the conviction unless there is an affirmative indication that the jury relied on the invalid ground.' [Citation.]"[3] (*People v. Thompson* (2010) 49 Cal.4th 79, 119 (*Thompson*).)

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[3] Appellant misrepresents the harmless error standard by arguing we must reverse if insufficient evidence supported either theory, due to the absence of any affirmative indication in the

2. *Felony-Murder Theory*

Appellant argues the evidence of his intent to kidnap Pineda was insufficient to sustain a first degree murder conviction on a felony-murder theory.

a. *Governing Principles*

Under the felony-murder doctrine, a killing is first degree murder if committed in the actual or attempted perpetration of kidnapping or certain other felonies. (1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2019) Crimes Against the Person, § 151, p. 954, citing Pen. Code, § 189.) The elements of kidnapping are "'(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance.' [Citation.]" (*People v. Bell* (2009) 179 Cal.App.4th 428, 435.) Courts often refer to the element of movement over a substantial

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record that the jury relied on one theory rather than the other. That might have been the standard if appellant contended the theories were legally inadequate. (See *People v. Perez* (2005) 35 Cal.4th 1219, 1233 [reversal required when the prosecution presented both legally correct and legally incorrect theories, and the reviewing court cannot determine from the record whether the jury relied on a correct theory].) However, appellant's contentions concern the purported insufficiency of the evidence to support the factual findings urged by the prosecution, rather than the inadequacy of those factual findings to establish guilt as a matter of law. His contentions therefore concern factual, not legal, inadequacy. (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1046.)

distance as the "'asportation'" element. (*Ibid.*) Under the asportation standard applicable to appellant's 1990 offenses, substantiality is "determined solely by the actual distance that the victim was moved." (*People v. Brooks* (2017) 3 Cal.5th 1, 68-69 (*Brooks*) [explaining this actual distance standard applies to any offense committed before the April 1999 decision in *People v. Martinez* (1999) 20 Cal.4th 225 (*Martinez*), which replaced it with a "'totality of the circumstances'" standard].)

"[T]he elements of attempted kidnaping are (1) a specific intent to commit the crime, and (2) a direct but ineffectual act done toward its commission." (1 Witkin & Epstein, Cal. Criminal Law, *supra*, § 316, p. 1152, citing Pen. Code, § 21a.) Asportation is not an element of attempted kidnapping. (*People v. Cole* (1985) 165 Cal.App.3d 41, 50 (*Cole*).) The prosecution need only prove the intended movement would have been substantial if completed. (See *Martinez*, *supra*, 20 Cal.4th at p. 241 [reducing conviction from kidnapping to attempted kidnapping, where the movement completed did not satisfy the actual distance standard but the intended movement would have if completed], citing *People v. Daly* (1992) 8 Cal.App.4th 47, 57 (*Daly*).) The substantiality of the intended movement may be inferred "[i]n the absence of any evidence to suggest that defendant contemplated no more than a trivial movement of his victim . . . ." (*People v. Fields* (1976) 56 Cal.App.3d 954, 957 (*Fields*); see also *Cole*, *supra*, at pp. 49-50 [substantial evidence supported attempted

kidnapping conviction, where the defendant forced the victim from her bedroom to her front door at knifepoint but, after hearing footsteps of a potential witness, left without the victim].) Thus, in the absence of such evidence, the prosecution need not "show more than a forcible attempt to move the victim into a motor vehicle in order to prove intent to move the victim a substantial distance . . . ." (*Fields*, *supra*, at p. 957; see also *Daly*, *supra*, at p. 57.)

b. *Analysis*

Substantial evidence supported appellant's first degree murder conviction on the prosecution's felony-murder theory, viz., that he killed Barkhordar in the course of attempting to kidnap Pineda. The jury was entitled to believe Pineda's testimony that prior to the day of the killing, appellant had abused her, followed her to the United States, threatened to kill her mother if she did not "go back with him," and insisted upon meeting her under false pretenses.[4] It was further entitled to believe her testimony that on the day of the killing, appellant insisted she approach his car, held a

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[4] Appellant argues his alleged attempts to coerce Pineda, through threats to kill her mother, to "go back with him" evinced an intent only to coerce her into resuming their marital relationship. However, he does not -- and reasonably could not -- argue the jury was compelled to speculate that he intended to resume their marital relationship at the Barkhordars' home. Thus, even under appellant's interpretation, his alleged threats evinced an intent to take Pineda from the Barkhordars' home to another location.

knife to her throat when she refused, looked back toward the street, and pursued her into the home, knife in hand. The jury reasonably could have found that these actions reflected an intent to force Pineda into his car and drive her to another location, and that they constituted a direct step toward doing so. Those findings are sufficient to establish an attempted kidnapping. (See *Fields*, *supra*, 56 Cal.App.3d at pp. 956-957 [substantial evidence supported attempted kidnapping conviction, where the defendant stopped his car beside the victim, grabbed her, and threatened her after she refused to get in; fact finder could infer intent to "carry her away some appreciable distance"]; *Daly*, *supra*, 8 Cal.App.4th at p. 57 [reducing conviction from kidnapping to attempted kidnapping, where, before the victim ran away, the defendant forced the victim across a parking lot to his van at gunpoint]; cf. *Martinez*, *supra*, 20 Cal.4th at p. 241; *Cole*, *supra*, 165 Cal.App.3d at pp. 49-50.) The jury could further find that by killing Barkhordar during his continued pursuit of Pineda, appellant killed him in the course of the attempted kidnapping.

Contrary to appellant's suggestion, we need not determine whether substantial evidence supported an additional finding that appellant intended to take Pineda back to El Salvador. While the prosecutor argued this was appellant's ultimate goal, in order to find him guilty, the jury was required to find only that appellant intended to take Pineda away from the residence. Moreover, to assess the evidentiary support for a conviction, we do not review "the

theories articulated in the prosecutor's argument," but instead review "the evidence presented and the possible inferences drawn therefrom . . . ." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126; accord, *People v. Clark* (2011) 52 Cal.4th 856, 947.) As explained, substantial evidence supported an inference of appellant's intent to kidnap Pineda regardless of any intent to return to El Salvador.

Because substantial evidence supported that inference, the jury was entitled to reject the alternative inferences appellant suggests, viz., that he intended to "woo" Pineda with a view of his car, to scare her, to kill her "on the porch," or to sexually assault her (presumably also on the porch). (See, e.g., *Cole*, *supra*, 165 Cal.App.3d at p. 48 [substantial evidence supported attempted kidnapping conviction; even if the jury could have drawn inferences other than intent to kidnap from defendant's forcing the victim downstairs at knifepoint, the jury could reasonably have rejected the other inferences].)

In sum, substantial evidence supported appellant's first degree murder conviction under a felony-murder theory. This conclusion alone warrants affirming the conviction, due to the absence of any affirmative indication in the record that the jury relied instead on the premeditation and deliberation theory. (See *Thompson*, *supra*, 49 Cal.4th at p. 119.) Nevertheless, we consider the merits of appellant's challenge to the sufficiency of the evidence supporting the premeditation and deliberation theory.

3. *Premeditation and Deliberation Theory*

Appellant argues there was insufficient evidence of premeditation and deliberation to sustain a first degree murder conviction, relying on his characterization of the murder as occurring during a "sudden, unprovoked explosion of violence."

a. *Governing Principles*

Murder that is willful, premeditated, and deliberate is first degree murder. (Pen. Code, § 189.) A murder is "premeditated" if considered beforehand and "deliberate" if the decision to kill results from careful thought and weighing of competing considerations. (*People v. Lee* (2011) 51 Cal.4th 620, 636 (*Lee*).) The required extent of reflection may occur quickly. (*Ibid.*) In assessing the sufficiency of evidence of premeditation and deliberation, courts often consider three factors: planning, motive, and manner of killing. (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 10 (*Shamblin*), citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).) These "*Anderson* factors" are merely a guide; no specific factor or combination of factors is a requirement. (*Shamblin*, *supra*, at p. 10 & fn. 16.)

b. *Analysis*

Substantial evidence supported appellant's first degree murder conviction under a theory of premeditation and deliberation. All three *Anderson* factors support this conclusion. As elaborated below, the jury reasonably could have found (1) appellant was motivated to kill Barkhordar to

prevent him from physically intervening or serving as a witness; (2) appellant had planned to kill anyone he perceived as an obstacle in the manner he perceived Barkhordar; and (3) appellant's infliction of nine stab wounds reflected a deliberate decision not only to incapacitate him but to ensure his death.

First, the evidence supported a motive for the killing: removing Barkhordar as a perceived obstacle. Indeed, appellant acknowledges the evidence supported an inference that he attacked Barkhordar in "response to an obstacle being placed in appellant's path to catch up to Pineda . . . ." The jury reasonably could have found appellant was motivated to kill Barkhordar to prevent interference in completing the crime. Alternatively, the jury reasonably could have found appellant was motivated to kill Barkhordar to prevent interference in getting away with the crime -- in other words, to eliminate him as a potential witness. (See *People v. Elliot* (2005) 37 Cal.4th 453, 471 (*Elliot*) [jury reasonably could have found defendant had motive to eliminate victim as witness to his attempts to commit robbery and torture]; *People v. Bolin* (1998) 18 Cal.4th 297, 332 [jury reasonably could have found defendant had motive to eliminate victims as witnesses to his shooting of another victim].)

Second, the fact that appellant brought a knife as he pursued Pineda through the home and into the bedroom was evidence that he planned to kill any occupant whom he perceived as an obstacle. (See *People v. Steele* (2002) 27

Cal.4th 1230, 1250 [evidence defendant brought knife into victim's home was evidence of planning]; *Lee*, *supra*, 51 Cal.4th at p. 636 [evidence defendant brought loaded gun to scene of killing "indicat[ed] he had considered the possibility of a violent encounter"]; *Elliot*, *supra*, 37 Cal.4th at p. 471 [inference that defendant armed himself with knife prior to accosting victim supported further inference he planned a violent encounter].) Contrary to appellant's suggestion, the jury need not have found appellant knew Barkhordar or planned to use the knife against him specifically.[5] (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1183-1184 [where defendant attacked a "crack house" and murdered occupant trying to escape, jury reasonably could have relied on evidence of planning, motive, and manner of killing to find premeditation and deliberation, "even if the specific victim was selected more or less at random"].)

Third and finally, the manner of killing supported an inference of deliberation. Appellant does not dispute that he stabbed Barkhordar nine times. The jury could infer that in

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[5] The jury reasonably could have found appellant did not perceive Lizeth as an obstacle in the same manner he perceived her husband, relying on Pineda's testimony that appellant threatened to kill Lizeth if she contacted the police (after she had seen her husband dying on the floor, giving immediate weight to appellant's threat), or Lizeth's testimony that he released her after she pleaded for her life and assured him she was on his side. Thus, contrary to another of appellant's suggestions, the fact that he spared Lizeth did not preclude the jury from finding motive or planning.

the time required to complete this series of stabbings, appellant made a deliberate decision to ensure Barkhordar's death, rather than merely incapacitating him with nonlethal wounds. (See *People v. Williams* (2018) 23 Cal.App.5th 396, 410-411 (*Williams*) [manner of killing evinced deliberation, where victim suffered "two neck stabs, with an implied interval to reflect, as well as . . . blunt force trauma in different areas of the victim's body"]; *People v. Salazar* (2016) 63 Cal.4th 214, 245 ["The fact that [the victim] was shot nine times at close range also supports the conclusion that the killing was deliberate"]; *People v. Brady* (2010) 50 Cal.4th 547, 564-565 (*Brady*) [manner of killing evinced deliberation, where defendant fired series of three shots from increasingly close range, indicating decision to ensure death].) While the jury could have inferred, as appellant argues, that the repeated stabbings reflected unthinking impulse, perhaps influenced by appellant's admittedly unprovoked rage, the jury was entitled to reject such an inference. (See *Williams*, *supra*, at pp. 410-411 [jury reasonably could have found stab wounds and blunt force injuries reflected an "emotional, berserk attack," but was permitted to find they reflected premeditation and deliberation instead]; *Brady*, *supra*, at p. 565 [similar with respect to series of gunshots].)

The cases on which appellant relies are distinguishable. (See *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1267 [defendant killed victim by firing only one shot, after which he directed his brother to call 911 and otherwise

behaved as if "horrified and distraught about what he had done"]; *People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9 (*Rowland*) [no evidence established motive or defendant's acquisition of weapon -- viz., an electrical cord, "a normal object to be found in a bedroom" -- before he used it to strangle victim].) Appellant's reliance on *Rowland* is unpersuasive for the additional reason that the *Rowland* court's analysis of the manner of killing has arguably been undermined by subsequent precedent. (See *Shamblin*, *supra*, 236 Cal.App.4th at p. 12 [observing *Rowland* predated California Supreme Court precedent holding that "strangulation that takes place over several minutes affords the killer ample time to think over the consequences of his action"].)

In sum, substantial evidence supported appellant's first degree murder conviction on a theory of premeditation and deliberation. Neither this theory nor the felony-murder theory was factually insufficient.

B. *Failure to Instruct on the Elements of the Felony-Murder Special-Circumstance Allegation*

Appellant contends the trial court prejudicially erred in failing to instruct the jury on the elements of the felony-murder special-circumstance allegation.

1. *Standard of Review*

We review claims of instructional error de novo. (*People v. Rivera* (2019) 7 Cal.5th 306, 326 (*Rivera*).) A trial

court has a duty to instruct the jury, on its own motion, on the essential elements of each charged offense or special-circumstance allegation. (*People v. Merritt* (2017) 2 Cal.5th 819, 824 (*Merritt*) [offenses]; *People v. Mil* (2012) 53 Cal.4th 400, 409 [special-circumstance allegations].) A failure to instruct on elements requires automatic reversal if it vitiates all of the jury's findings, thereby amounting to a total deprivation of a jury trial. (*Merritt*, *supra*, at pp. 822, 829-830.) Otherwise, a failure to instruct on elements does not require reversal if it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error. (*Id.* at pp. 822, 831.)

2. *Governing Principles*

"Once the jury finds the defendant has committed first degree murder, the felony-murder special circumstance applies if the murder was committed during the commission or attempted commission of a statutorily enumerated felony, and subjects the defendant to a sentence of death or of life without the possibility of parole." (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 80 (*Andreasen*), citing Pen. Code, § 190.2, subd. (a)(17).) Kidnapping is an enumerated felony. (Pen. Code, § 190.2, subd. (a)(17)(B).) The elements of the special-circumstance allegation are similar to those of the

felony-murder doctrine.[6] (3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2019) Punishment, § 532, pp. 853-854.)

3. *Analysis*

The trial court erred in failing to instruct the jury on the elements of the felony-murder special-circumstance allegation. Respondent does not dispute that the trial court failed to deliver an instruction identifying the elements of the special-circumstance allegation as such. Instead, respondent argues this omission was not error because "[t]he court gave at least one instruction on the requirements for finding the special circumstance true, the issues within the special circumstance finding were covered by other given instructions, and the prosecutor told the jury that felony murder [as a theory of first degree murder] and the [felony-murder] special circumstance contained the same

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[6] The special-circumstance allegation is subject to an additional rule -- not an element -- requiring a finding that the underlying felony was not committed for the sole purpose of effectuating the killing. (*Brooks*, *supra*, 3 Cal.5th at pp. 116-120; *Andreasen*, *supra*, 214 Cal.App.4th at pp. 80-81.) However, the trial court has no duty to instruct on this rule on its own motion "'unless the evidence supports an inference that the defendant might have intended to murder the victim without having an independent intent to commit the specified felony.' [Citation.]" (*Brooks*, *supra*, at pp. 117-118.) Here, the trial court had no such duty because there was no evidence from which the jury could have inferred appellant attempted to kidnap Pineda solely to effectuate Barkhordar's murder. (See *id.* at pp. 117-118; cf. *Andreasen*, *supra*, at p. 81.) Appellant does not argue otherwise.

elements." Our Supreme Court has considered similar facts when assessing whether error in failing to instruct on elements was harmless beyond a reasonable doubt. (See *Rivera*, *supra*, 7 Cal.5th at p. 332; *Merritt*, *supra*, 2 Cal.5th at pp. 831-832.) However, it has never suggested such facts can cure or prevent the error in the first instance. (See *Merritt*, *supra*, at pp. 824, 831 [expressly noting the Court did not suggest counsel's arguments cured the trial court's "very serious constitutional error" in failing to instruct on most elements of robbery].) We therefore find the omission erroneous and consider whether it was harmless beyond a reasonable doubt.[7]

It is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error. Appellant concedes the content of the felony murder instructions "largely replicate[d]" the content of the instructions that would have been given on the special-circumstance allegation. For instance, the court instructed the jury that appellant's intent to commit kidnapping -- the only element of the special-circumstance allegation to which appellant assigns any significance -- was an element of both the felony-murder theory and of its underlying felony, viz., attempted kidnapping. The court equipped the jury to

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[7] Appellant does not argue the error requires automatic reversal. Nor could he, as the failure to instruct on the elements did not vitiate all of the jury's findings. (See *Merritt*, *supra*, 2 Cal.5th at p. 829.) "Perhaps crucially, it did not vitiate the finding on the only *contested* issue at trial: defendant's identity as the perpetrator." (*Ibid.*)

understand every element of the special-circumstance allegation.

Nor was the jury left to guess whether the felony murder instructions shed light on the elements of the special-circumstance allegation. The prosecutor informed the jury that the elements of the special-circumstance allegation were essentially identical to those of the felony-murder theory. (See *Merritt*, *supra*, 2 Cal.5th at p. 831 [counsel's accurate comments on elements of robbery in closing arguments weighed against prejudice from jury instructions' omission of most elements], citing *People v. Jennings* (2010) 50 Cal.4th 616, 678 (*Jennings*).) Moreover, the prosecutor asked the jury to find the allegation true because appellant intended to kidnap Pineda. (See *Merritt*, at p. 678 [omission of actus reus element from instruction on torture-murder special-circumstance allegation was harmless beyond a reasonable doubt, in part because prosecutor's closing argument confirmed element].) The prosecutor's arguments did not conflict with any of the court's instructions; on the contrary, they were consistent with the court's instructions that each allegation, and the felony-murder special-circumstance allegation in particular, required proof of an intent or mental state.

Further, appellant did not contest any element of the special-circumstances allegation at trial, instead contesting only his identity as the perpetrator. (Cf. *Merritt*, *supra*, 2 Cal.5th at p. 831 [failure to instruct on elements of robbery was harmless beyond a reasonable doubt, in part because

defense counsel contested only identification and expressly conceded the perpetrator committed robbery].) It is true that appellant did not expressly concede that the perpetrator killed Barkhordar in the course of an attempted kidnapping. However, his counsel implicitly conceded the matter by telling the jury the prosecutor's arguments concerning first degree murder and the special-circumstance allegation, albeit purportedly irrelevant, were "accurate and well-stated." (Cf. *Jennings*, *supra*, 50 Cal.4th at p. 678 [defense counsel's failure to argue defendant did not torture victim weighed against prejudice from omission of actus reus element from instruction on torture-murder special-circumstance allegation].)

Appellant does little to suggest the jury may have reached a different conclusion if instructed on the elements. He characterizes the evidence of his intent to kidnap Pineda as "underwhelming," identifying this purported deficiency as the most important indication of prejudice. As we have explained, however, the evidence of his intent to kidnap Pineda was substantial. More fundamentally, appellant fails to identify any manner in which the omitted instructions might have led the jury to evaluate the evidence of intent in a manner more favorable to him.

We conclude the instructional omission was harmless beyond a reasonable doubt due to the combined effect of the other instructions' coverage of the elements, the prosecutor's accurate characterization of the elements, and defense counsel's implicit concession regarding all of the elements.

C. *Undisputed Corrections to Appellant's Sentence*

The parties agree we should correct appellant's sentence by (1) awarding appellant 888 days of presentence conduct credit; (2) striking the parole revocation fine; and (3) ordering the trial court to correct the abstract of judgment, which erroneously recorded appellant's sentence on count two (attempted murder) as life without the possibility of parole. We will grant the requested relief.

Appellant is entitled to 888 days of presentence conduct credit, representing two days of credit for each of the 444 four-day periods encompassed within appellant's 1777 days of presentence custody. At the time of appellant's offenses, the presentence conduct credit statute made appellant eligible for two days of credit for each four-day period of custody. (Former Pen. Code, § 4019, subds. (b), (c), (f), as amended by Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) Despite his conviction for murder, appellant is not barred from receiving presentence conduct credit under Penal Code section 2933.2 because he committed the murder before that statute's effective date of June 3, 1998. (Pen. Code, § 2933.2, subd. (d) ["This section shall only apply to murder that is committed on or after the date on which this section becomes operative"]; *People v. Chism* (2014) 58 Cal.4th 1266, 1336 [statute inapplicable to defendant who committed offenses before effective date of June 3, 1998].) Similarly, because appellant committed his offenses before the September 21, 1994, effective date of Penal Code section 2933.1, that statute does not limit appellant's presentence conduct credit.

(Pen. Code, § 2933.1, subd. (d) ["This section shall only apply to offenses listed in subdivision (a) that are committed on or after the date on which this section becomes operative"]; *People v. Cooper* (2002) 27 Cal.4th 38, 43 ["Section 2933.1 became effective on September 21, 1994"].)

The parole revocation fine cannot stand. Imposition of the fine under Penal Code section 1202.45, enacted five years after appellant's offenses, violated the proscription against ex post facto laws. (See *People v. Flores* (2009) 176 Cal.App.4th 1171, 1181-1182.) Even absent that proscription, the statute would not apply because the court sentenced appellant, on count one, to life without the possibility of parole. (E.g., *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 380 [striking parole revocation fine because death sentence did not include period of parole].)

Finally, the trial court must correct the abstract of judgment to reflect a life term, rather than a life term without the possibility of parole, on count two (attempted murder). The record supports the parties' observation that the sentence recorded in the abstract of judgment differs from the sentence orally pronounced by the trial court. "[W]here, as here, the Attorney General identifies an evident discrepancy between the abstract of judgment and the judgment that the reporter's transcript and the trial court's minute order reflect, the appellate court itself should order the trial court to correct the abstract of judgment." (*People v. Mitchell* (2001) 26 Cal.4th 181, 188; see also *id.* at p. 186

[appellate court may make such an order on its own motion].)

DISPOSITION

We affirm the judgment as modified to award appellant 888 days of presentence conduct credit and to strike the parole revocation fine. We remand to the trial court with instructions to prepare an amended abstract of judgment reflecting the award of 888 days of presentence conduct credit, the absence of a parole revocation fine, and a life term (rather than a life term without the possibility of parole) on count two (attempted murder). We further instruct the trial court to forward a certified copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J. COLLINS, J.